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IN THE

Supreme Court of the United States

OCTOBER TERM OF 1958.

No. 618

UNITED STATES LINES COMPANY,

Petitioner,

against

ST. PAUL FIRE AND MARINE INSURANCE CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

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OCTOBER TERM OF 1958.

No. .....

UNITED STATES LINES COMPANY,
Petitioner,

against

ST. PAUL FIRE AND MARINE INSURANCE CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on August 27, 1958. Petitioner's petition for rehearing was denied by the Court of Appeals on October 7, 1958.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Second Circuit printed in Appendix B hereto, *infra*, page 17, is reported at 258 F. 2d 374; the denial of the petition for rehearing by the Court of Appeals by a 2 to 1 vote, which has not as yet been officially reported, is printed in Appendix B hereto, *infra*, page 22; and the opinion of the United States District Court for the Southern District of New York printed in Appendix B hereto, *infra*, page 23, is reported at 156 F. Supp. 879.

Jurisdiction.

The order and judgment of the United States Court of Appeals for the Second Circuit was entered on August 27, 1958. Petitioner filed a petition for rehearing, which was denied on October 7, 1958 by a 2 to 1 vote.

The jurisdiction of this court is invoked under 28 U. S. C. §1254(1). The court's jurisdiction is also invoked under Rule 19 of the United States Supreme Court.

Questions Presented.

1. Can a claim which is time-barred in the hands of a prospective subrogor confer any greater rights on a prospective subrogee, who is not yet entitled to subrogation?

2. Can Rule 14(a) of the Federal Rules of Civil Procedure, a procedural rule, create greater rights in a prospective subrogee than those possessed by the prospective subrogor?

3. Can Rule 14(a) of the Federal Rules of Civil Procedure, a procedural rule, be so construed as to deprive petitioner of its substantive contractual and statutory time for suit defenses?

Statutes Involved.

The statutory provisions involved in this suit are:

Rule 14(a) of the Federal Rules of Civil Procedure;

46 U. S. C. §1303(6) of the U. S. Carriage of Goods by Sea Act, 1936;

Rule Making Act of 1934 (Act of June 19, 1934, c. 651, §1 and 2; 48 Stat. 1064 as amended to May 10, 1950, c. 174, §2; 64 Stat. 158; 28 U. S. C. §2072);
Amendment 5 of the United States Constitution.

The text of these statutes is printed in Appendix A hereto, *infra*, page 14, *et seq.*

Statement.*

On October 31, 1956 plaintiff M. V. M., Inc., commenced suit to recover $173,639.87 against St. Paul Fire and Marine Insurance Co., the respondent herein, (defendant and third party plaintiff below) for alleged damage in five shipments of radio-phonographs shipped on five vessels of the petitioner-third party defendant, United States Lines Company. The complaint alleges that the shipments were delivered in good and sound condition to the petitioner in Hamburg, Germany, and that they were received in New York in a broken and damaged condition due to external causes. Before answering, the respondent third party plaintiff, pursuant to Rule 14 of the Federal Rules of Civil Procedure, obtained an order to make the petitioner-third party defendant a party and served its third party summons and complaint on petitioner on November 2, 1956.

The petitioner appeared, answered and, after the expiration of the one year time for suit within which the plaintiff could have sued the petitioner had expired but within the proper time provided for by law, moved for judgment dismissing the third party complaint on the ground that the respondent was not a proper party and was not the real party in interest inasmuch as it had not become subrogated to plaintiff's rights, and inasmuch as

* A time schedule of pertinent events is in the District Court opinion, *infra*, pages 24-25.

plaintiff had not sued the third party defendant within one year, the claim was time barred by the provisions of the bills of lading and §1303(6) of the U. S. Carriage of Goods by Sea Act, 1936 (at times referred to as Cogsa), and for such relief as to the court would seem just and proper.

The District Court granted the petitioner's motion (Appendix B hereto, *infra*, page 23). The respondent appealed and the Court of Appeals reversed the District Court (Appendix B hereto, *infra*, page 17). Thereafter the petitioner petitioned for rehearing. The petition for rehearing was denied on October 7, 1958 by a 2 to 1 vote. Judge Galston, who dissented, succinctly stated: "Since in my opinion a time-barred claim would carry nothing to a subrogee I vote to grant the petition" (Appendix B hereto, *infra*, page 22).

While the third party summons and complaint were filed within one year, at the time the motion for judgment to dismiss the third party action was filed, the one-year time for suit under the contracts and statute had expired. It is uncontroverted that the plaintiff has never brought suit against petitioner. The respondent has not paid the plaintiff-insured, and consequently has not become subrogated to the rights, if any, of the plaintiff against petitioner.

The jurisdiction of the District Court was based on diversity, it being alleged that plaintiff is a New York corporation and respondent a Minnesota corporation and the matter in controversy exceeded $3,000.

Reasons for Granting the Writ.

(A) The Court of Appeals in its reversal of the District Court's granting of the petitioner's motion for summary judgment held that the same suit provisions which govern the subrogor's cause of action against the petitioner do not govern the subrogee's cause of action, if any, against the petitioner.

The Court of Appeals said at, *infra*, page 20:

> "• • • Even less tenable is the argument that the statute of limitations, which would apply to a suit between plaintiff and USL, should bar a suit based on liability over against USL."

This holding of the Court of Appeals is clearly one in conflict with the overwhelming weight of authority and also the decisions of this Court. The Court of Appeals is saying that a subrogee-insurance company is not bound by the same time for suit provisions as its subrogor-insured. Nothing can be further from the existing and long established law. This Court has often held that a subrogee stands in the shoes of his subrogor and receives no more or no less than his subrogor had and is subject to contractual as well as statutory defenses assertable against the subrogor. *Wager* v. *Providence Insurance Company* (1893) 150 U. S. 99, 108; *Phoenix Ins. Co.* v. *Erie Transportation Co.* (1886) 117 U. S. 312, 320-322, 325-326. In *United States* v. *Munsey Trust Co.* (1947) 332 U. S. 234 at page 242, this Court again asserted this fundamental principle of the law of subrogation saying:

> "• • • One who rests on subrogation stands in the place of one whose claim he has paid, as if the payment giving rise to the subrogation had not been made. See *Aetna Life Insurance Co.* v. *Middleport*, 124 U. S. 534, 548. • • • "

Certainly then, the holding of the Court of Appeals that the petitioner could not assert the same time-bar defenses against the respondent (a prospective subrogee) as it could assert against the plaintiff below (a prospective subrogor) is clearly contrary to the applicable decisions of this Court. It is a holding that a subrogee, and only a prospective subrogee at that, receives or will receive greater rights than his subrogor.

Prior to this decision, the petitioner is not aware of any conflict of circuits on the question that a subrogee-insurance company's cause of action is the same as its insured's and is subject to the defenses assertable against the insured. However, this decision now presents such a conflict. It is diametrically opposed to the [illegible] Circuit and other circuits. In *Alexander* v. *Young* (10 Cir., 1933) 65 F. 2d 752, the views of the 10th Circuit on the subject are expressed at page 757:

> "One who acquires or succeeds to rights, claims, or securities through subrogation takes them burdened with the limitations and disqualifications to which they were subject in the hands of the person for whom he is substituted. The rights he acquires thereby are not greater nor better than those which the person for whom he is substituted had at the time of the payment which effected the subrogation. Swarts *v.* Siegel (C. C. A. 8) 117 F. 13, 15; Globe & Rutgers Fire Ins. Co. *v.* Hines (C. C. A. 2) 273 F. 774; In re Paoli Lithia Springs Hotel Co. (C. C. A. 7) 5 F. (2d) 902, 904; Phoenix Ins. Co. *v.* Erie & Western Transportation Co., 117 U. S. 312, 321, 322, 6 S. Ct. 750, 29 L. Ed. 873; American Surety Co. *v.* School Dist. 64, 117 Neb. 6,219 N. W. 583, 588.
>
> "Since subrogation is limited to such rights as the creditor has at the time of payment by the surety, the surety is not subrogated to a right which originally existed in favor of the creditor, but which the latter released or discharged before payment by the surety. Globe & Rutgers Fire Ins. Co. *v.* Hines, *supra*; Leach *v.* Commercial Sav. Bank, 205 Iowa 1154, 213 N. W. 517, 520; American Surety Co. *v.* School Dist., *supra;* Tarbell *v.* Parker, 101 Mass. 165; George *v.* Somerville, 153 Mo. 7, 54 S. W. 491, 493."

Indeed, the holding of the Court of Appeals in this case is also in direct conflict with the prior decisions of its own

circuit. The previous state of the law is clearly and succinctly stated by Judge Augustus N. Hand in *Switzerland General Ins. Co.* v. *Navigazione Libera Triestina, S. A.* (2 Cir., 1937) 91 F. 2d 960 at page 963:

> "• • • In exercising its right of subrogation, the Insurance Company proceeds wholly in the right of the insured and its claim is subject to all the defenses which the carrier might assert against the consignee. While it acted with reasonable promptitude after judgment had gone against it in the action by the insured, its rights depend on those of the insured and his cause of action against the carrier has long since been barred. • • •"

See also *Rieser* v. *Baltimore and Ohio Railroad Company* (2 Cir., 1955) 228 F. 2d 563.

(B) The Court of Appeals has obviously held that Rule 14 (a) of the Federal Rules of Civil Procedure may abridge, enlarge or modify substantive rights. Under § 1303 (6) of the U. S. Carriage of Goods by Sea Act, the petitioner is given the substantive right to assert the defense of time bar against any cause of action brought against it more than one year after delivery.

The District Court held, *infra*, page 30 that this time bar provision was substantive saying that "(t)his suit clause is one which extinguishes the cause of action itself, and not merely the remedy." This holding of the District Court was not commented on by the Court of Appeals. The only other case dealing directly with the question is *Leo Hess International Corporation* v. *Isthmian Steamship Company* (1st Dept. 1958) 5 App. Div. 2d 250, 170 N. Y. S. 2d 705, where the Court stated at pages 253 and 254:

> "There is no question that where a carrier fails to deliver goods within one year after the goods

> should have been delivered, the statute and the limitation clause in the bill of lading discharges it of all liability in any action brought to recover for non-delivery. It would also appear, by analogy to the Interstate Commerce Act (U. S. Code, tit. 49, § 16, subd. [3]), covering domestic interstate shipments (an analogy previously drawn by the Court of Appeals [*M. & T. Trust Co.* v. *Export SS. Corp.*, 262 N. Y. 92, 96-97]), that the statute and contract limitations are not tolled or revived by word or conduct of the parties, at least in the absence of fraud, even when reduced to formal stipulation executed prior to their expiration (*cf. Midstate Co.* v. *The Pennsylvania R. R. Co.*, 320 U. S. 356). • • •"

Additionally, this statute is similar to that involved in *Midstate Horticultural Co., Inc.* v. *Pennsylvania Railroad Co.* (1943) 320 U. S. 356, which held that a time for suit clause under the Interstate Commerce Act (49 U. S. C. §16(3)(a)) was substantive and the parties could not extend it even in a formal agreement. Furthermore, the very language of the COGSA suit provision itself, ("In any event the carrier and the ship shall be discharged from all liability • • •") compels the conclusion that this provision provides a substantive right.

The bills of lading, which constitute the contracts of carriage, give the petitioner as a substantive provision thereof the one-year time for suit defense. That contractual time for suit provisions are substantive rights is clearly settled law. *Home Ins. Co.* v. *Dick* (1930) 281 U. S. 397; *Order of Travelers* v. *Wolfe* (1947) 331 U. S. 586; *New York Central Railroad Co.* v. *Lazarus et al.* (2 Cir., 1922) 278 Fed. 900, cert. denied 266 U. S. 612.

It is undisputed that the plaintiff did not sue the petitioner within the one year. The only claim of a suit against the petitioner is that asserted in the third party complaint. It is clear that the respondent at that time did not have nor

was it subrogated to any rights against the petitioner. It is indisputable that the respondent has not paid the plaintiff insured. Therefore, under well established principles of the law of subrogation, respondent has not succeeded to any rights of the plaintiff.

It is a fundamental principle of the law that the right of subrogation does not arise until the subrogee has paid the loss or, at the earliest, in the absence of payment, a judgment has been recovered against it. *Wager* v. *Providence Insurance Company, supra; Aetna Life Insurance Company* v. *Middleport,* (1888) 124 U. S. 534; *Prairie State Bank* v. *United States,* (1896) 164 U. S. 227.

As has been repeatedly stated, the subrogee "stands in the shoes" of the subrogor, receiving no greater rights than its subrogor possessed at the time the right of subrogation arises and bound by and subject to all of the defenses available against the original party, including statutes of limitation. *Wager* v. *Providence Insurance Company, supra; Exchange Mutual Indemnity Insurance Company* v. *Central Hudson Gas and Electric Company,* (1926) 243 N. Y. 75. Therefore, at the time of payment all that the respondent can be subrogated to will be, at most, a time-barred claim.* Since the plaintiff did not sue the petitioner within one year, the petitioner had and has the substantive right to assert the contractual and statutory time-bar defenses. Respondent filed its third-party summons and complaint within the one year. However, if Rule 14 (a) of the Federal Rules of Civil Procedure had never been promulgated, it is clear that respondent could never have attempted to sue the petitioner at the time it served the third party summons and complaint. Respondent would have had to wait until payment or, in the absence of payment, until the recovery

* As Judge Galston stated (*infra*, page 22): "Since in my opinion a time-barred claim would carry nothing to a subrogee I vote to grant the petition."

of a judgment against it. At that time, as well as at the present time, the substantive contractual and statutory time for suit defenses would be and are valid, meritorious and complete defenses to such a suit. As the Court of Appeals construes Rule 14(a), the petitioner is deprived of these substantive defenses and, furthermore, the rights of the respondent, who may in the future be subrogated, have been enlarged. The respondent may now receive a claim, which is time-barred in the hands of the subrogor, free of any such time-bar.

In its decisions, this Court has stated that the Federal Rules deal only with matters of procedure and cannot affect substantive rights. *United States* v. *Sherwood* (1941) 312 U. S. 584; *Sibbach* v. *Wilson & Co., Inc.* (1941) 312 U. S. 1. Additionally, the Rule Making Act of 1934 under which the Supreme Court promulgated the Federal Rules limits the effect of these rules so that they may not "abridge, enlarge or modify any substantive right" (*infra*, page 16). The decision of the Court of Appeals flies in the face of the Rule Making Act and also in the face of the decisions of this Court.

(C) Since by the holding of the Court of Appeals the petitioner has been deprived of its substantive statutory and contractual time-bar defenses, the constitutional rights of the petitioner have been violated.

The petitioner has a substantive right to be discharged from liability inasmuch as suit was not brought against it by a party to the contracts of carriage, nor by one who has present rights derived from a party to the contracts, within the one year time for suit provisions. Such right, derived both from statute and contract, is a property right. The deprivation of this property right is a direct violation of the Fifth Amendment of the Constitution.

In *New York Central Railroad Co.* v. *Lazarus et al.*, *supra*, at page 904, it was said:

> "• • • But where the time within which an action could be brought is agreed upon by the terms of the contract of shipment, it is one of the terms and conditions thereof and Congress could not deprive the plaintiff in error of this property right, for to do so would be a violation of the provisions of the Fifth Amendment. • • •"

Additionally, in *Order of Travelers* v. *Wolfe*, *supra*, at page 608, Mr. Justice Burton said:

> "• • • Such shorter periods, written into private contracts, also have been held to be entitled to the constitutional protection of the Fourteenth Amendment under appropriate circumstances. See *Home Ins. Co.* v. *Dick*, 281 U. S. 397, and *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292, U. S. 143, mentioned again *infra*."

(D) This Court on a number of occasions has reviewed questions dealing with the effect of the Federal Rules of Civil Procedure. *United States* v. *Sherwood*, *supra*; *Sibbach* v. *Wilson & Co., Inc.*, *supra*. In *Mississippi Pub. Corp.* v. *Murphree* (1946) 326 U. S. 438, Mr. Chief Justice Stone said, at page 444:

> "• • • The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency. • • •"

It is submitted that the present case is of as great, if not greater, import than the above cases, in which this Court granted certiorari. This is a matter calling for a final decision by the Supreme Court.

(E) The question of the effect of the Carriage of Goods by Sea Act has, in a number of cases, been decided by this court. The question here under the Act is also one of great importance in the shipping industry in that it is daily dealt with by shippers, underwriters, carriers and attorneys, in the handling of claims and in litigated matters. Additionally, the contractual one-year time for suit provision is one contained in most bills of lading of domestic steamship companies as well as in the bills of lading of a great majority of foreign steamship companies. Indeed, the Carriage of Goods by Sea Act may, and has been in fact, extended by carriers to contracts of carriage between any port of the United States or its possessions and any other port of the United States and its possessions. 46 U. S. C. §1312.

The novelty and importance of the question has been admitted by respondent. In the District Court respondent stated in a letter to Judge Levet, dated January 2, 1958, that his decision "deals with a novel question which is very important to the marine insurance business in this country".

Furthermore, the question of whether or not Rule 14 (a) may deprive a third party defendant of a time bar defense is one of great importance and one which this Court should finally determine, particularly since it was this Court which promulgated these rules.

In conclusion, it is earnestly submitted that this Court should grant certiorari: (1) to determine the unanswered question as to the substantive effect of the one-year time for suit provision of the Carriage of Goods by Sea Act; (2) to finally settle the question of whether Rule 14 (a), a procedural rule, may deprive a third party defendant of its substantive statutory and contractual defenses of time bar and to prevent the deprivation of the rights guaranteed this petitioner by Amendment 5 of the Constitution; and (3) to

exercise its power of supervision by overruling the holding of the Court of Appeals that a different time for suit provision controls in an action by a subrogee than that in an action by a subrogor to whose rights the subrogee succeeds. This holding represents a radical violation and change of the existing and long-standing law of subrogation in conflict with the decision of this Court and other Circuits.

CONCLUSION.

FOR THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

MICHAEL F. WHALEN,
Counsel for Petitioner.

JAMES McGARRY,

and

KIRLIN, CAMPBELL & KEATING,
Of Counsel.

Dated New York, N. Y.,
December 31st, 1958.

Appendix A.

Pertinent Statutory and Constitutional Provisions.

28 U. S. C.

"Rule 14. Third-Party Practice

(a) When Defendant May Bring in Third Party. Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. As amended Dec. 27, 1946, effective March 19, 1948."

46 U. S. C.

"§1303. Responsibilities and liabilities of carrier and ship—Seaworthiness

* * * * * * *

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and receiver shall give all reasonable facilities to each other for inspecting and tallying the goods."

28 U. S. C.

"§2072. Rules of civil procedure for district courts.

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. As amended May 10, 1950, c. 174, §2, 64 Stat. 158.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961, amended May 24, 1949, c. 139 §103, 63 Stat. 104; July 18, 1949, c. 343, §2, 63 Stat. 446."

CONSTITUTION.

"AMENDMENT V—CAPITAL CRIMES; DUE PROCESS

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Appendix B.

Opinion of United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 326—October Term, 1957.

(Argued May 5, 1958 Decided August 27, 1958.)

Docket No. 24982

ST. PAUL FIRE AND MARINE INSURANCE CO.,
Defendant and Third Party
Plaintiff-Appellant,

v.

UNITED STATES LINES COMPANY,
Third Party Defendant-
Appellee.

Before:

WATERMAN and MOORE, Circuit Judges,
and GALSTON, District Judge.

Appeal from the United States District Court for the Southern District of New York; Richard H. Levet, *Judge*.

St. Paul Fire and Marine Insurance Co., defendant and third-party plaintiff, appeals from a summary judgment dismissing its third-party complaint against United States Lines Company filed pursuant to Rule 14(a), Federal Rules of Civil Procedure, on the ground that the claim was time-barred. Reported below at 156 F. Supp. 879.

Reversed.



DANIEL A. SULLIVAN, Esq., New York, N. Y. (Brigham, Englar, Jones & Houston, New York, N. Y., on the brief), *for Defendant and Third-Party Plaintiff-Appellant.*

MICHAEL F. WHALEN, Esq., New York, N. Y. (James McGarry, New York, N. Y., Kirlin, Campbell & Keating, New York, N. Y., on the brief), *for Third-Party Defendant-Appellee.*

MOORE, Circuit Judge:

On October 31, 1956 M. V. M. Inc., a New York corporation, filed suit in the Southern District of New York against the St. Paul Fire and Marine Insurance Co. (referred to as the "Insurance Company"), a Minnesota corporation, alleging: (1) that M. V. M. Co., the predecessor in interest of M. V. M. Inc., had insured under an All Risk Marine and Inland Open Policy issued by the defendant Insurance Company five shipments of radio-phonographs from Hamburg, Germany to New York, N. Y., the shipments originating in October and November 1955, final delivery being made in December 1955; (2) that the goods were delivered to the carrier, United States Lines Co. (referred to as "USL"), at Hamburg, in good condition; (3) that the goods were received in New York in a broken and damaged condition due to external causes; and (4) that a loss of $173,639.87 was sustained.

On the same day on which the complaint was filed, the defendant Insurance Company obtained an *ex parte* order to file and serve a third-party complaint against USL pursuant to Rule 14(a) of the Federal Rules of Civil Procedure. This third-party complaint was filed the next day, November 1, 1956, and alleged that four of the five shipments were transported aboard vessels owned and operated by USL and that "if the plaintiff recovers against the defendant for the damage to the merchandise the third-party defendant will be liable over to the defendant who will have been subrogated to the plaintiff's rights against the third-party

defendant." The answer of USL the third-party defendant, pleaded among other affirmative defenses the one year time-for-suit limitation contained in each bill of lading as well as the one year time bar contained in the Carriage of Goods by Sea Act, 46 U. S. C. A. section 1303(6).

On July 31, 1957 USL made a motion to dismiss the third-party complaint on the ground that because the Insurance Company had not as yet been subrogated to the original plaintiff's rights against USL and because the original plaintiff had not sued USL within the one year time limitation, the third-party complaint was time-barred.

Treating the motion as one for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure the district court granted the motion and dismissed the third-party complaint. From the judgment entered thereon the Insurance Company appeals.

USL concedes that the third-party complaint was filed "within the one year time for suit" period (USL Br., p. 16) but argues that until the Insurance Company had paid the loss or at the very least suffered judgment on the original complaint it had not been damaged and, therefore, possessed no right of subrogation at that time. USL concludes that the filing of a third-party complaint under Rule 14(a) prior to obtaining subrogation rights could not stop the statute of limitations from running until the act of subrogation occurred by actual payment of the claim or judgment. To hold otherwise, USL asserts, would convert Rule 14(a), a procedural remedy, into an instrument for abridging substantive rights.

USL's argument that if the running of the statute of limitations is stopped by filing a third-party claim under Rule 14(a), its substantive rights will be vitiated is unconvincing. Viewed from USL's standpoint of safeguarding its substantive rights, it can make no difference whether the consignee or the insurance company files the claim against it. In either case it has equally timely notice of the loss and the claim asserted. In either case once the fact of loss has been established, its burden of proof will be exactly the same. See 46 U. S. C. A. section 1304(2) (q).

The Rule expressly provides that a third-party summons and complaint may be served "Upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." The very purpose of the Rule is to eliminate the necessity of independent actions against persons who "may be liable" where liability may be determined upon the facts common to, or arising out of, the same transaction. The federal and New York state court decisions hold that third-party impleader practice encompasses subrogation claims. *Glens Falls Indemnity Co.* v. *Atlantic Bldg. Corp.*, 4 Cir., 1952, 199 F. 2d 60; *Concordia College Corp.* v. *Great American Ins. Co.*, D. Minn., 1953, 14 F. R. D. 403; *Madison Ave. Prop. Corp.* v. *Royal Insurance Co.*, 281 App. Div. 641.

USL bases its argument upon the grounds that until the Insurance Company has been held liable the Insurance Company has not been damaged and possesses no right of subrogation. The court below argued that subrogation would not occur until the loss had been paid and that the Insurance Company, therefore, had no right of subrogation at the time it served its third-party complaint. The court also held that because the plaintiff had not sued USL within one year USL was relieved of liability by reason of the statute of limitations.

These grounds are irrelevant. Rule 14 was designed to permit third-party defendants to be brought into the action so that the rights of the original defendant and the third-party defendant could be established in the same trial. To hold that the plaintiff must proceed against the Insurance Company and that the Insurance Company can take no steps to sue USL until liability has been determined and the judgment paid would make of Rule 14 a nullity. Even less tenable is the argument that the statute of limitations, which would apply to a suit between plaintiff and USL, should bar a suit based on liability over against USL.

The effect of Rule 14 is clearly illustrated in 3 Moore's *Federal Practice* ¶14.08 where he points out the difference between indemnity against liability and indemnity against loss saying:

"Now assume that E. F. has agreed to indemnify C. D. against loss. Clearly E. F. is not liable in an independent action on this indemnity agreement until C. D. has suffered loss, and C. D. has suffered no loss merely because of the commencement of the action by A. B. Were it not for the italicized words, *supra* ["who is *or may be* liable"], C. D. could not implead E. F. By virtue of them C. D. is enabled to implead E. F., but the substantive status of E. F. will not be affected. The time when C. D.'s claim is presented against him is accelerated. But although a judgment may be obtained on the third-party claim, C. D. could not execute thereon until he had discharged A. B.'s judgment against him, in whole or in part, so that he brings himself within his indemnity-against-loss-agreement with E. F."

USL is not prejudiced in any way by this result because it is privileged to plead any and all defenses, substantive and procedural, it may have. The words "may be liable" could only have been inserted to enable all issues in cases similar to this to be disposed of in a single trial. There is sound reason behind such procedure.

Denial of Petition of United States Lines for Rehearing.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

M. V. M., INC.,

Plaintiff,

v.

ST. PAUL FIRE AND MARINE INSURANCE CO.,
Defendant and Third Party,
Plaintiff-Appellant,

v.

UNITED STATES LINES COMPANY, sued herein as
UNITED STATES LINES CO.,
Third Party Defendant-Appellee.

PETITION OF UNITED STATES LINES FOR REHEARING

Petition for rehearing denied.

STERRY R. WATERMAN,
LEONARD P. MOORE,
U. S. C. JJ.

Since in my opinion a time-barred claim would carry nothing to a subrogee I vote to grant the petition.

CLARENCE G. GALSTON,
U. S. D. J.

October 7, 1958.

Opinion of The United States District Court for the Southern District of New York.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

M. V. M. INC.,
Plaintiff,
against
ST. PAUL FIRE AND MARINE INSURANCE CO.,
Defendant and Third Party Plaintiff,
against
UNITED STATES LINES COMPANY, sued herein as UNITED STATES LINES CO.,
Third Party Defendant.

Civil 114-200.

Appearances:

BIGHAM, ENGLAR, JONES & HOUSTON, Attorneys for Defendant and Third Party Plaintiff, 99 John Street, New York, N. Y., DANIEL A. SULLIVAN, of Counsel.

KIRLIN, CAMPBELL & KEATING, Attorneys for Third Party Defendant, 120 Broadway, New York, N. Y., MICHAEL F. WHALEN, JAMES MCGARRY, of Counsel.

LEVET, D. J.

The third party defendant, United States Lines Company, sued herein as United States Lines Co. (hereinafter referred to as United States Lines), has moved this court for an order under Rule 12(b) of the Federal Rules of Civil Procedure dismissing the third party complaint herein on the ground that the third party plaintiff is not a proper

third party plaintiff and is not the real party in interest. It is contended that the third party plaintiff has not yet become subrograted to plaintiff's rights; that since plaintiff did not sue the third party defendant within one year, the claim is time-barred by reason of the provisions of certain bills of lading involved and by reason of Section 3(6) of the United States Carriage of Goods by Sea Act, 1936, 46 USCA §1303(6).

The original complaint in this action against St. Paul Fire and Marine Insurance Co. (hereinafter referred to as St. Paul), the defendant and now the third party plaintiff, in based upon a certain insurance policy and an alleged loss and damage to five shipments of radio-phonographs made from Hamburg, Germany to M.V.M. Inc., the plaintiff's predecessor in interest. The complaint alleges that all five shipments were delivered in good and sound condition to the United States Lines in Hamburg, Germany, and were received in New York by M.V.M. Inc., plaintiff's predecessor in interest, in broken and damaged condition due to external causes. The defendant St. Paul impleaded the third party defendant, United States Lines, and served a complaint against such third party defendant.

The time factors involved in this motion are as follows:

1. In November, 1955, the five shipments of radiophonographs were made from Hamburg, Germany, covered by various bills of lading;

2. On or about and before December 28, 1955, all shipments were delivered;

3. On October 31, 1956, the complaint was filed against defendant St. Paul;

4. On November 2, 1956, the third party summons was served upon the third party defendant, United States Lines;

5. On January 23, 1957, the third party defendant filed its answer;

6. On July 31, 1957, the third party defendant moved to dismiss the third party complaint.

Each of the five bills of lading involved contained this statement:

> "• • • the carrier and the ship shall be discharged from all liability for any loss, damage, or delay unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

Title 46 U. S. C. A. §1303(6) is in part as follows:

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered."

The third party defendant directs his attack upon the third party complaint to the following words appearing in paragraph 7 thereof:

> "• • • *if* the plaintiff recovers against the defendant for the damage to the merchandise, the third-party defendant *will be liable* over to the defendant, who *will have been* subrogated to the plaintiff's rights against the third-party defendant." (Emphasis supplied)

The third party defendant argues that the third party plaintiff will have been subrogated to the plaintiff's rights against the third party defendant only *if* and *when* the plaintiff recovers against St. Paul and that such rights, if any, will arise only at some future time; that the third party

complaint presents no claim for present rights since there has been no basis up to the present time for subrogation since St. Paul has disputed its liability to its assured, the plaintiff, and has made no payment or even obtained any assignment of the assured's claim. Thus, the third party defendant maintains that the rights of the third party plaintiff will arise only upon payment to the assured or at the earliest upon recovery of a judgment against it by the assured.

The argument of the third party defendant further concludes that by reason of the one-year-time-for-suit clause, above set forth, and by reason of the provisions of Title 46 USCA §1303(6), above set forth, the plaintiff is now barred from commencing any action against the third party defendant and that, therefore, the third party plaintiff is also barred. Specifically, the third party defendant states that the last shipment arrived at New York aboard the U. S. *American Merchant* on December 3, 1955, and that on or before December 28, 1955, all merchandise was delivered by the carrier. Thus, it is claimed that plaintiff's time to sue the third party defendant has now expired; and accordingly the third party defendant cannot sue the third party plaintiff.

The third party plaintiff, St. Paul, opposes the motion to dismiss the third party complaint upon the following grounds:

1. That the motion was not made in time;

2. That Rule 14(a) of the Federal Rules of Civil Procedure permits the assertion of the claim set forth in the third party complaint.

As to the time within which this motion was made, St. Paul refers to Rule 12(b) of the Federal Rules of Civil Procedure, which in its pertinent portions states:

> "• • • A motion making any of these defenses (referring among others to a motion to dismiss for failure to state a claim upon which relief can be

granted) shall be made before pleading if a further pleading is permitted.* * *"

However, Rule 12(b) also contains the further statement:

"* * * If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

This court, therefore, will consider that the motion was made pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The second basis of opposition is the third party plaintiff's contention with respect to the interpretation of Rule 14(a) of the Federal Rules of Civil Procedure. The essential portion of this rule referring to this matter is as follows:

"When Defendant May Bring in Third Party. Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action *who is or may be liable* to him for all or part of the plaintiff's claim against him.* * *" (Emphasis supplied)

The third party plaintiff contends that the words "may be liable" are sufficient to sustain the validity of the third party complaint. However, in order to even eventually sustain such liability, the third party defendant, United States Lines, must have been sued within one year after the delivery of the goods under the provisions of the aforesaid bills of lading and under Title 46 USCA §1303(6).

The plaintiff, M. V. M. Inc., sued St. Paul and the only action against United States Lines is the third party complaint. This complaint merely alleges in effect (1) that the United States Lines were the owners of the ships carrying the goods; (2) that the defendant St. Paul insured the plaintiff on these shipments of merchandise; (3) that the plaintiff has sued the defendant St. Paul on the insurance policy alleging damage to these shipments; and (4) that if plaintiff, M. V. M. Inc., recovers against St. Paul on the policy, the third party defendant, United States Lines, will be liable over to the defendant St. Paul "who will have been subrogated to the plaintiff's rights against the third party defendant."

In view of the provisions of the bills of lading and of Title 46 USCA §1303(6), it does not appear that either the plaintiff, M. V. M. Inc., or the defendant, St. Paul, the third party plaintiff, has asserted any timely cause of action against the third party defendant, United States Lines, on which subrogation may occur. Certainly, St. Paul has no present right of subrogation and it is elementary that a subrogation does not occur until the subrogee insurance company has paid the loss or at the earliest a judgment has been recovered against it. *Massaro* v. *National Fire Insurance Co. of Hartford, Conn.*, 292 N. Y. S. 65 (4th Dept. 1946), affirmed 274 N. Y. 603; *Alexandra Restaurant, Inc.* v. *New Hampshire Ins. Co. of Manchester*, 71 N. Y. S. 2d 515 (1st Dept. 1947), affirmed 297 N. Y. 858; *Aetna Life Insurance Company* v. *Middleport*, 124 U. S. 534 (1888); *New Amsterdam Casualty Co.* v. *Baker*, D. C. D. Md., 1947, 74 F. Supp. 809.

Furthermore, the subrogee receives no greater rights than its subrogor possessed at the time of subrogation and is bound by and subject to all of the defenses available against the original party, including statutes of limitations. *Wager* v. *Providence Insurance Co.*, 150 U. S. 99, 108 (1893); *Switzerland General Ins. Co. of Zurich* v. *Navigazione Libera Triestina, S. A.*, 2 Cir., 1937, 91 F. 2d 960; *Liberty Mutual Ins. Co.* v. *Sheila-Lynn, Inc.*, 57 N. Y. S. 2d 707 (App. Term 1st Dept. 1945), affirmed 61 N. Y. S. 2d 373; *New Amsterdam Casualty Co.* v. *Baker, supra.*

More than one year has elapsed and no method appears by which either the plaintiff or the defendant St. Paul may avoid the effects of the provisions of the bills of lading or of Title 46 U. S. C. A. §1303(6). In fact, even if the plaintiff were to attempt to amend its complaint to assert a cause of action against the third party defendant, such attempt would be unavailing, because barred by these time-for-suit provisions. See *Carlise* v. *Monongahela Railway Company, et al.*, D. C. W. D. Pa., 1954, 16 FRD 426; *Horan* v. *Pope & Talbot, Inc., et al.*, D. C. E. D. Pa., 1953, 119 F. Supp. 711.

Rule 14(a) of the Federal Rules of Civil Procedure was not intended to effect substantive rights. See *Calvery* v. *Peak Drilling Co.*, D. C. W. D. Okla., 1954, 118 F. Supp. 335, affirmed 215 F. 2d 368; *Thompson* v. *Cranston, et al.*, D. C. W. D. N. Y., 1942, 2 FRD 270, affirmed 132 F. 2d 631, cert. denied 319 U. S. 741.

The Supreme Court in referring to the defense of statute of limitations in *Guaranty Trust Co.* v. *United States* (1938), 304 U. S. 126, stated at page 136:

> "• • • It (the statute of limitations) has long been regarded by this Court and by the courts of New York as a meritorious defense, in itself serving public interests."

Certainly, an even stronger case is made out when the time-for-suit provision is one embodied in the contract of partie. Indeed, at this point the following language from *New York Cent. R. Co.* v. *Lazarus, et al.*, 2 Cir., 1922, 278 Fed. 900, cert. denied 266 U. S. 612, is pertinent:

> "• • • But where the time within which an action could be brought is agreed upon by the terms of the contract of shipment, it is one of the terms and conditions thereof and Congress could not deprive the plaintiff in error of this property right, for to do so would be a violation of the provisions of the Fifth Amendment. • • •" (p. 904)

The one year time-for-suit clause of the United States Carriage of Goods by Sea Act, 46 U. S. C. A. §1303(6), is of

its own force and effect applicable to these contracts of carriage. This suit clause is one which extinguishes the cause of action itself, and not merely the remedy. In construing a time-for-suit clause under the Interstate Commerce Act (49 U. S. C. A. §16(3)(a)) in a suit between a railroad carrier and a shipper, the Supreme Court in *Midstate Horticultural Co., Inc.* v. *Pennsylvania Railroad Co.* (1943), 320 U. S. 356 stated at page 364:

> "The purport of the decisions is that Congress intended, when the period has run, to put an end to the substantive claim and the corresponding liability. The cause of action, the very foundation for relief, is extinguished. Thus, in A. J. Phillips Co. *v.* Grand Trunk Western Ry. Co., this Court held the objection to the timeliness of the shipper's suit properly was raised by demurrer, and said that 'the lapse of time • • • destroys the liability • • • whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction.' 236 U. S. 662, 667."

Consequently, the motion for judgment in favor of the third party defendant is granted.

Settle order on notice.

RICHARD H. LEVET,
United States District Judge.

Dated: New York, N. Y.
November 25, 1957.